

**BEFORE THE COMMISSIONER OF  
POLITICAL PRACTICES**

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In the Matter of the	)	<b>SUMMARY OF FACTS</b>
Complaint Against	)	<b>AND</b>
Dennis Paxinos, Yellowstone	)	<b>STATEMENT OF FINDINGS</b>
County Attorney	)	

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Complainant John Huntley, Fallon County Attorney, filed a complaint against Dennis Paxinos, Yellowstone County Attorney, on February 1, 2000. The Huntley complaint alleges that Mr. Paxinos violated Section 2-2-121(3), MCA, of Montana's Code of Ethics and Section 13-35-226(3), MCA, of Montana's laws concerning campaign finances and practices.

Mr. Huntley's complaint alleges that Mr. Paxinos violated two provisions of Montana law:

CLAIM I

Complainant Huntley alleges that Mr. Paxinos used public time, facilities, equipment, supplies and personnel for campaign activities in violation of Section 2-2-121(3), MCA.

CLAIM II

Complainant Huntley alleges that Mr. Paxinos solicited support for or opposition to candidates for the Montana Supreme Court and Attorney General while at his job or place of employment in violation of Section 13-35-226(3), MCA.

**SUMMARY OF FACTS**

1. The Montana County Attorneys' Association, Inc. ("MCAA") is a Montana non-profit corporation incorporated in 1974. MCAA was formed to generally represent

the interests and concerns of Montana's County Attorneys and develop projects and programs which will assist Montana's County Attorneys in the performance of their duties.

2. The MCAA is funded by public monies. Annual membership dues are paid out of the funds budgeted for the operation of the offices of the County Attorneys in those counties whose elected County Attorneys choose to become members of the MCAA. Membership dues in 1999-2000 were \$300 per year. The funds paid to the MCAA are administered by the Attorney General's office and used for such functions as providing training and continuing education for MCAA's members.

3. The MCAA has debated for several years whether to endorse certain candidates for elected office. In 1998, the Mineral County Attorney and MCAA's accountant wrote letters discussing the tax implications if the MCAA became involved in political activities. It was recommended that the MCAA establish a separate political action committee ("PAC") if it decided to become involved in political campaigns. It appears that no action was taken in response to the information received from the Mineral County Attorney and MCAA's accountant.

4. The issue of whether the MCAA should endorse political candidates resurfaced at MCAA's July 17, 1999 summer meeting. The business meeting minutes indicate that there "was a continuing discussion on the role of the Association in political races that affect our responsibilities. . . ." Christine Cooke, Bighorn County Attorney and MCAA's President, appointed an eight-member subcommittee to study the issues of "how to start a PAC and how to develop and adopt the policies governing when to

take a position.” Kim Christopher, Lake County Attorney and MCAA’s secretary, was appointed to chair the subcommittee studying whether to create a PAC.

5. MCAA’s winter meeting was held on December 2, 1999 in Billings, Montana. The question of whether MCAA should endorse candidates was discussed during the Association’s business meeting. Proponents of the MCAA endorsing candidates argued that the public fully expects elected county attorneys to discuss candidates and officeholders in relation to law enforcement and public safety issues. The discussion centered on whether endorsements should be made by MCAA as an organization or by individual county attorneys as members of a separate PAC. The initial motion made by Dennis Paxinos, Yellowstone County Attorney and MCAA’s second vice president, was to create a separate PAC to endorse political candidates. MCAA ultimately rejected establishing a separate PAC to make political endorsements because it decided that endorsements by the Association would have a greater public impact than endorsements by a PAC comprised only of individual members of the Association.<sup>1</sup>

6. The motion adopted by MCAA during its December 2, 1999 business meeting provided that MCAA would endorse candidates or political issues by a 75% vote under a process to be established by MCAA’s Board. MCAA’s Board of Directors was given the power to determine how the ballot was to be worded and who would appear on the ballot.

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<sup>1</sup> Minutes of MCAA’s December 2, 1999 business meeting were prepared after interviews for this decision were conducted. The minutes were received on May 10, 2000 and indicate that the membership discussed advice received from Dulcy Hubbert, Administrative Officer in the office of the Commissioner of Political Practices, in deciding the PAC issue. Ms. Hubbert disputes portions of the minutes describing the advice allegedly given. Whatever advice was given by Ms. Hubbert, it does not change this decision or the finding in paragraph 5.

7. MCAA's Board of Directors met after the business meeting on December 2, 1999. The board adopted a motion specifying that MCAA endorsements can only be made if a candidate receives 75% of the votes cast and at least 50% of the membership votes. The motion also specified that MCAA endorsements "will be limited to" judicial elections, the Attorney General's race and "issues of concern for county attorneys." The Board recommended that the MCAA endorse Karla Gray for Supreme Court Chief Justice, Chris Tweeten for Supreme Court Justice and Mike McGrath for Attorney General.

8. Dennis Paxinos volunteered to prepare the ballot and mail ballots to MCAA's membership. Mr. Paxinos offered his services because he had been involved in MCAA's legislative lobbying efforts and he had a complete list of the names and addresses of MCAA's membership at his Yellowstone County office.

9. On or about December 15, 1999 Dennis Paxinos mailed a cover letter, a ballot and return envelopes to each MCAA member (see Exhibit 1 attached to this decision). The cover letter indicated that "the MCAA decided to hold an election to endorse certain candidates who will have a direct impact on our offices. . . ." MCAA's members were instructed to return their ballots no later than January 15, 2000 and assured each member that their ballots would remain anonymous.

10. The letter and ballot attached as Exhibit 1 were prepared during working hours at the Yellowstone County Attorney's Office. Mr. Paxinos dictated the letter and ballot and his secretary typed the documents. The letter was printed on Yellowstone County Attorney stationery and mailed in Yellowstone County Attorney envelopes.

Postage for the mailing of the letter and ballot was paid for by the Yellowstone County Attorney's Office.

11. Mr. Paxinos estimates that the total cost of the mailing, including one hour of staff time at \$10.30 per hour, was \$33.66. Mr. Paxinos did not include any time for the value of his services in preparing the letter and ballot.

12. MCAA held a special meeting on January 28, 2000 to count the endorsement ballots. The special meeting was held in the courtroom of Judge Baugh in the Yellowstone County Courthouse. MCAA's President, Chris Cooke, and MCAA members Lee Kerr, Marty Lambert and Dennis Paxinos were present to count the ballots. Also in Attendance was Dusty Deschamps, a former Missoula County Attorney. In addition, Kim Marchwick, court reporter for Judge Baugh, was present and stenographically recorded the meeting at the request of President Cooke.

13. Ballots received from MCAA's membership resulted in the following endorsements:

A. 38 MCAA members voted to endorse Karla Gray for Supreme Court Justice, 5 voted no.

B. 38 MCAA members voted to endorse Chris Tweeten for Supreme Court Justice, five voted no.

C. 32 MCAA members voted to endorse Mike McGrath for Attorney General, nine voted no.

14. At the conclusion of the January 28, 2000 meeting, President Cooke declared that Karla Gray, Chris Tweeten and Mike McGrath had received the

endorsement of MCAA. President Cooke indicated that she would contact the three candidates and advise them that they had received MCAA's endorsement.

15. President Cooke notified Karla Gray, Chris Tweeten and Mike McGrath by telephone that they had received the endorsement of MCAA shortly after the January 28, 2000 special meeting. In addition, Ms. Cooke advised each of the three candidates that the MCAA would not take any action to publicize the MCAA's endorsements. Candidates Gray, Tweeten and McGrath were advised by President Cooke that if they wanted to make use of the endorsements they would have to do so at their expense.

16. Candidates Tweeten and McGrath issued press releases indicating that they had received the endorsement of MCAA. Candidate Gray has not, as of this date, issued a press release indicating she has received the endorsement of MCAA.

17. Mr. Paxinos claims that the MCAA reimbursed Yellowstone County for the \$33.66 in office expenses attributed to preparing and distributing the endorsement ballots.

18. Mr. Paxinos did receive a money order for \$33.66 on or about February 21, 2000 from President Cooke. The reimbursement from president Cooke was from her personal funds and not from the MCAA. Ms. Cooke indicated that she reimbursed Yellowstone County from her personal funds rather than MCAA's funds because of the complaint filed by Mr. Huntley.

19. Most, if not all, of the candidates for the Montana Supreme Court and Attorney General attended either the 1999 summer or winter meetings of MCAA. All three Attorney General candidates (Mike McGrath, Steve Bullock and Jim Rice),

Supreme Court candidate Chris Tweeten and District Judge candidate Blair Jones attended MCAA's December 2, 1999 meeting. Candidates have historically attended MCAA meetings to introduce themselves to individual county attorneys and to discuss law enforcement issues. There is no evidence that any of the current candidates for the Montana Supreme Court or the office of Attorney General requested the endorsement of MCAA or otherwise coordinated MCAA's endorsement.

20. The endorsements by MCAA in January 2000 were the first endorsements ever made by MCAA.

## **STATEMENT OF FINDINGS**

### CLAIM I

Montana's Code of Ethics applies to public employees and public officers at both the state and local government levels (see, e.g., Sections 2-2-101, 125, 136 and 144, MCA). However, the Commissioner of Political Practices does not have jurisdiction to review alleged ethics violations by a local government officer or a local government employee (see the definitions of public employee, public officer, state agency and state officer in Section 2-2-102, MCA, and the definition of local government in Section 2-2-144(6), MCA). An elected county attorney is a local government officer is subject to the complaint procedures specified in Section 2-2-144, MCA. The ethics portion of this complaint must be filed with the Yellowstone County Attorney under Section 2-2-144(1), MCA, or in the alternative, with a three-member panel appointed by the Yellowstone County Commissioners as authorized under Section 2-2-144(5), MCA.

It must be noted at this juncture that there are significant problems with Montana's Code of Ethics as it applies to local government officers and local

government employees. Section 2-2-144(1), MCA, authorizes a complaint against a local government official or employee to be filed with the county attorney. In the alternative, a complaint against a local government official or employee may be filed with a three-member ethics panel created by the county commissioners if such a panel has been created. However, creation of the ethics panel is discretionary, not mandatory, under Section 2-2-144(5), MCA. If an ethics panel is not created under Section 2-2-144(5), MCA, the ethics complaint must be filed with the county attorney even if, as in this matter, the county attorney is the target of the complaint. But even if Mr. Huntley files an ethics complaint against Mr. Paxinos in Yellowstone County, Montana's Code of Ethics may not prohibit a local government officer or employee from using public time, facilities, equipment, supplies, personnel or funds for campaign related activities. Section 2-2-125, MCA, establishes separate rules of conduct for local government officers and local government employees. Section 2-2-125, MCA, does not contain the same expansive prohibitions applicable to public officers and public employees under Section 2-2-121, MCA. If the Montana Legislature intended to include local government officers and local government employees within the definitions of "public officer" and "public employee" under Montana's Code of Ethics, why was a separate and less restrictive code of conduct enacted for local government officers and employees? It is my sincere hope that the Montana Legislature will revisit the Montana Code of Ethics and enact meaningful legislation to address these ambiguities and other problems with Montana's Code of Ethics.

## CLAIM II

Section 13-35-226(3), MCA, reads as follows:

(3) A public employee may not solicit support for or opposition to any political committee, the nomination or election of any person to public office, or the passage of a ballot issue while on the job or at the place of employment. However, subject to 2-2-121, this section is not intended to restrict the right of a public employee to express personal political views.

Mr. Paxinos argues that he did not violate Section 13-35-226(3), MCA, because:

1. A poll conducted by the MCAA does not constitute solicitation;
2. The MCAA's endorsements constitute the expression of personal political views authorized by Section 13-35-226(3), MCA; and
3. The endorsement of political candidates by the MCAA is "incidental" to the duties of a county attorney if the endorsements are restricted to candidates who may have a direct impact on the law enforcement and public safety issues dealt with by the MCAA.

Mr. Paxinos' first two defenses are related and can be addressed together. Section 13-35-226(3), MCA, clearly recognizes a public employee's First Amendment right to express personal political views at work. A public employee can indicate his personal preference for a candidate, a ballot issue or political committee at work so long as the expression of personal political views does not become solicitation. If a public employee's expression of personal opinions at work includes acts or words soliciting support for or opposition to a candidate or ballot issue, such solicitation is prohibited by Section 13-35-226(3), MCA. For example, a public employee's statement that she

personally supports candidate X or that a particular ballot issue sounds like a good idea is a permissible expression of opinion at work under Section 13-35-226(3), MCA. Conversely, using public facilities, equipment, supplies or time to urge someone to vote for or against candidate X, to raise money for candidate X, to conduct a poll for use in candidate X's campaign or to do work on candidate X's campaign are examples of impermissible solicitation of support or opposition prohibited by Section 13-35-226(3), MCA.

Based on the preceding analysis, Mr. Paxinos' use of public time, personnel, equipment and supplies to prepare, distribute and count ballots for a poll designed to endorse certain candidates does not fall within the personal political views exception in Section 13-35-226(3), MCA.<sup>2</sup> Had Mr. Paxinos chosen to express his personal political preference for Karla Gray, Chris Tweeten and Mike McGrath, the expression of such personal political views would have been protected under Section 13-35-226(3), MCA. Instead, the MCAA decided to endorse certain candidates because the MCAA believed that such a collective and organizational endorsement was a public obligation and would have greater public influence than an endorsement by a PAC comprised of individual county attorneys. The polling conducted by Mr. Paxinos on behalf of MCAA was an organized effort intended to generate public support for those endorsed. The use of public facilities, supplies, equipment and personnel to conduct a poll that will be used to endorse political candidates is solicitation prohibited by Section 13-35-226(3), MCA.

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<sup>2</sup> In addition to Mr. Paxinos, several other county attorneys used public time, equipment and facilities to conduct MCAA's poll. All of the county attorneys who counted the ballots on January 28, 2000 were presumably paid while driving to and from Billings to count the ballots. Those county attorneys who

Mr. Paxinos asserts that the endorsement of political candidates is “incidental” to the duties of a county attorney if the endorsements pertain to the law enforcement and public safety issues dealt with by the MCAA. The rationale for this defense is the reference to Section 2-2-121 of Montana’s Code of Ethics in Section 13-35-226(3), MCA, and Mr. Paxinos’ assertion that the public expects county attorneys to educate the public about law enforcement issues. This Commissioner must respectfully disagree with Mr. Paxinos’ interpretation of Section 13-35-226(3), MCA.

First, if Mr. Paxinos is correct, Section 13-35-226(3), MCA, would be unenforceable and meaningless. If county attorneys can use public time, facilities, supplies and personnel to endorse Supreme Court and Attorney General candidates, then why can’t the endorsements be extended to gubernatorial, legislative or other judicial candidates who espouse “tough on crime” platforms? If public facilities, supplies, personnel and equipment can be used for candidate endorsements, then why can’t public resources be used to run a candidate’s campaign? Section 13-35-226(3), MCA, establishes a bright and enforceable line that allows public employees to express personal political views at work but prohibits the use of public time, equipment, supplies and personnel to solicit support for or opposition to candidates or ballot issues.

Second, the reference to Section 2-2-121 in Section 13-35-226(3), MCA, does not, in my opinion, change the limited scope of the personal political views exception in Section 13-35-226(3), MCA. Section 13-35-226(3), MCA, allows the expression of personal political views at work by a public employee “subject to 2-2-121.” Section 2-2-121, MCA, states, in pertinent part, that the use of public facilities, supplies, equipment

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traveled to Billings were no doubt reimbursed for travel expenses incurred or used county-owned vehicles. The ballots were counted in a Yellowstone County District Court Room.

and personnel “properly incidental to another activity required or authorized by law” is permitted under Montana’s Code of Ethics. Black’s Law Dictionary (1951 Ed.) defines the word “incidental” to mean “something necessary, appertaining to, or depending upon another which is termed the principal. . . .” The 1999 edition of Black’s includes a definition of “incidental authority” to mean “authority needed to carry out actual or apparent authority.” A county attorney’s actual and principal duties are to serve as the legal advisor and criminal prosecutor for the county (see, e.g., Sections 7-4-2711 and 7-4-2712, MCA). Nothing in Title 7, Chapter 4, Part 27 of the Montana Code or other provisions of state law suggests that using public time, facilities, equipment, supplies and personnel to endorse political candidates or participate in political campaigns is necessary to the performance of a county attorney’s actual and principal duties.

Despite the fact that Mr. Paxinos’ conduct in this matter is contrary to the prohibitions of Section 13-35-226(3), MCA, Mr. Paxinos is not a public employee subject to the prohibitions of Section 13-35-226(3), MCA. Montana’s campaign finance and practices statutes do not define the term “public employee” (see Section 13-1-101, MCA). Montana’s Code of Ethics defines the term “public employee” but the definition does not include local government officers (i.e., elected local government officials; see Sections 2-2-102(6), (7), (9) and 2-2-144, MCA). Montana’s Code of Ethics makes a clear distinction between public employees, a “public officer” or “state officer” (Sections 2-2-102(7) and (9), MCA), and local government officers and employees (Sections 2-2-125 and 144, MCA). The statement of purpose for the Code of Ethics acknowledges that the code “recognizes distinctions between legislators, other officers and employees of state government, and officers and employees of local government and prescribes

some standards of conduct common to all categories and some standards of conduct adapted to each category. . .” (Section 2-2-101, MCA). Numerous other definitions in Montana law distinguish between public employees and elected state officials, department directors appointed by the Governor, private citizens appointed to quasi-judicial boards, temporary employees, and employees and officers of local governments. See, e.g., Sections 2-18-101(1), 2-8-1101, 2-18-809(5) and 2-18-701, MCA. None of the definitions cited include elected local government officers in the definition of “public employee” or “employee.”<sup>3</sup>

Montana’s rules of statutory construction provide that when “the meaning of a word or phrase is defined in any part of this code, such definition is applicable to the same word or phrase wherever it occurs, except where a contrary intention plainly appears” (Section 1-2-107, MCA, and Dept. of Revenue v. Gallatin Outpatient Clinic, 234 Mont. 425, 430, 763 P.2d 1128 (1988)). Nothing in Section 13-35-226(3), MCA, suggest that the Montana Legislature intended a broader definition of the term “public employee” to include elected local government officers, especially where the Commissioner administers a related law (the Code of Ethics) that excludes elected local government officers from the definition of public employee. Accordingly, Section 13-35-226(3), MCA, does not apply to Mr. Paxinos as an elected local government officer. It is my sincere hope that the Montana Legislature will correct this oversight and also apply the prohibitions of Section 13-35-226(3), MCA, to “public officers” and “state officers” as defined in Section 2-2-102, MCA.

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<sup>3</sup> One definition of the term “public employee” expressly includes local government employees but excludes elected local government officials. Sections 39-31-103(9) and (10), MCA, include local government employees who are employed by local governments under Montana’s Collective Bargaining

The final issue examined as a result of Mr. Huntley's complaint is whether the MCAA became an incidental political committee subject to reporting requirements by endorsing candidates. The MCAA's actions fall within the definition of "political committee" in Section 13-1-101(18), MCA. Two or more members of MCAA conducted a poll designed to lead to the public endorsement of three political candidates. The endorsements have substantial value to the candidates endorsed and fall within the definition of "contribution" and "expenditure" in 13-1-101(6) and (10), MCA. The question of whether the MCAA and the candidates who received the MCAA's endorsements have to report the value of MCAA's endorsements and in-kind services under ARM 44.10.411, 44.10.513 and 44.10.533 requires an analysis of the facts and the exceptions to the definitions of the terms contribution and expenditure in Section 13-1-101, MCA.

There is no evidence that the MCAA's endorsements were coordinated in advance with any of the candidates ultimately endorsed. The MCAA's decision to endorse Karla Gray, Chris Tweeten and Mike McGrath was driven by the MCAA's concern about recent court rulings and the belief the public expects county attorneys to speak out on law enforcement and public safety issues. Absent evidence that the MCAA's endorsements were coordinated in advance of the endorsements with the three candidates ultimately endorsed, Karla Gray, Chris Tweeten and Mike McGrath do not have to report the value of MCAA's endorsements as in-kind contributions.

The issue of whether the MCAA has to report the value of its polling activities as an independent expenditure in support of the three endorsed candidates revolves

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Act but elected local government officials are specifically excluded from the definition (see Section 39-31-103(9)(b)(i), MCA).

around the exceptions to the definitions of “contribution” and “expenditure” in Section 13-1-101, MCA. Both definitions allow a membership organization or a corporation to communicate with its members or shareholders about political matters and not report such expenditures if the communications are limited to the membership or shareholders (Section 13-1-101(6)(b)(iii) and (10)(b)(iv), MCA). In addition, the cost of a bona fide news story, commentary or editorial distributed through broadcast and print media of “general circulation” is exempt from campaign finance reporting (Sections 13-1-101(6)(b)(ii) and (10)(b)(iii), MCA). The membership communication exception recognizes the First Amendment rights of membership organizations and corporations to express political preferences to their membership/shareholders without becoming a political committee subject to the campaign finance reporting requirements of Montana law. The bona fide news story exception recognizes that if a membership organization or corporation takes a position on political issues, communicating that position via a bona fide news story is a nonreportable exercise of First Amendment rights. The individual members of a membership organization also have a fundamental First Amendment right to communicate the organization’s political preferences to others, including candidates who may be the beneficiaries of an endorsement.

Based on the preceding analysis, the MCAA’s independent decision to poll its members and endorse certain candidates under the facts of this case does not subject the MCAA to the political committee reporting requirements of Montana law. The MCAA did not coordinate its endorsements in advance with the candidates endorsed. The MCAA did not purchase advertising or otherwise make an expenditure of funds to publicly announce its endorsements. There is no evidence that the MCAA as an

organization has made unsolicited written membership communications about the endorsements to nonmembers. In fact, there is no indication that the MCAA has generally advised its members of the endorsement vote results. The MCAA's President did call the three candidates who received the MCAA's endorsement, but the candidates were advised that the MCAA would not make any expenditure to publicly announce the endorsements. The MCAA's President, as an individual member of MCAA, does not forfeit her First Amendment right to personally communicate the MCAA's poll results to others.

It must be emphasized that the MCAA should carefully consider this decision and how and if it will make political endorsements in the future. If the MCAA coordinates future candidate endorsements in advance with candidates, such advance coordinated activity becomes a reportable in-kind contribution for the candidate even if the MCAA escapes having to report as an incidental political committee under the membership communication exceptions in 13-1-101(6) and (10), MCA. The MCAA is a nonprofit corporation and corporate contributions to candidates are prohibited by Section 13-35-227, MCA.

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## CONCLUSION

Based on the preceding Summary of Facts and Statement of Findings:

1. Dennis Paxinos did not violate Section 13-35-226(3), MCA, because he is not a “public employee” subject to the prohibitions of Section 13-35-226(3), MCA.

2. The Commissioner of Political Practices does not have jurisdiction to determine whether Mr. Paxinos violated the Montana Code of Ethics because Mr. Paxinos is a local government officer subject to the complaint procedures in Section 2-2-144, MCA.

3. The MCAA did not make a reportable contribution or expenditure under existing Montana law.

DATED this \_\_\_\_\_ day of May, 2000.

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Linda L. Vaughey  
Commissioner of Political Practices

N.B. Exhibits are available upon request.